

STATE OF MICHIGAN  
IN THE SUPREME COURT

ELIZABETH A. COOK,

Plaintiff-Appellee,

vs.

CHRISTOPHER W. HARDY,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 250727

Ingham County Circuit  
Court No. 02-1399-NI

DENNIS D. ALBERTS (P26348)  
MICHAEL A. ROSS (P45266)  
Attorneys for Plaintiff-Appellee  
1869 East Maple Road  
Troy, MI 48083  
(248) 362-3707

MARY T. NEMETH (P34851)  
Co-Counsel for Defendant-Appellant  
615 Griswold, Suite 1305  
Detroit, MI 48226  
(313) 963-8200

THOMAS C. LEFLER, JR. (P33735)  
Attorney for Defendant-Appellant  
40900 Woodward Avenue, Suite 200  
Bloomfield Hills, MI 48304-2255  
(248) 258-2284

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO  
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

**PROOF OF SERVICE**

By: Dennis D. Alberts (P26348)  
Michael A. Ross (P45266)  
OGNE, ALBERTS & STUART, P.C.  
Attorneys for Plaintiff-Appellee  
1869 East Maple Road  
Troy, MI 48083  
(248) 362-3707

**FILED**

NOV 4 2005

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

## TABLE OF CONTENTS

Index of Authorities.....	iii
Introduction.....	1
Argument.....	1
Proof of Service.....	7

### **Appendix:**

<u>McDaniel</u> v <u>Hemker</u> , ____ Mich App ____, 2005 WL 2372802, Michigan Court of Appeals Docket No. 263150 (2005).....	Appendix 1
---	------------

<u>Behnke</u> v <u>Auto Owners Insurance Co</u> , Michigan Court of Appeals Docket No. 248107, 2004 WL 2072075 (September 16, 2004), Unpublished.....	Appendix 2
---	------------

## **INDEX OF AUTHORITIES**

### **CASES**

<u>Behnke v Auto Owners Insurance Co</u> , Michigan Court of Appeals Docket No. 248107, 2004 WL 2072075 (September 16, 2004), Unpublished.....	5
<u>Kreiner v Fischer</u> , 471 Mich 109; 683 NW2d 611 (2004).....	1,2,3,4
<u>McDaniel v Hemker</u> , ____ Mich App ____, 2005 WL 2372802, Michigan Court of Appeals Docket No. 263150 (2005).....	1,2,3

### **COURT RULES**

MCR 7.302(G)(1).....	1
----------------------	---

### **STATUTES**

MCLA 500.3135(2)(a).....	4,5
MCLA 500.3135(7).....	3

## INTRODUCTION

On October 7, 2005, the Michigan Supreme Court directed the clerk to schedule oral argument on "whether to grant the application [for leave to appeal] or take other peremptory action permitted by MCR 7.302(G)(1)." In the same order, the Court allowed the parties to file supplemental briefs, cautioning them to avoid submitting mere restatements of the arguments already contained in the application papers. As such, Plaintiff-Appellee Elizabeth Cook submits the following supplemental brief in order to bring to the Supreme Court's attention new published and unpublished authority from the Michigan Court of Appeals.

## ARGUMENT

**THE COURT OF APPEALS CORRECTLY GRANTED SUMMARY DISPOSITION IN FAVOR OF PLAINTIFF ON THE SERIOUS IMPAIRMENT OF BODY FUNCTION ISSUE, BECAUSE PLAINTIFF'S MULTIPLE LEG FRACTURES CONSTITUTED AN OBJECTIVELY MANIFESTED IMPAIRMENT OF AN IMPORTANT BODY FUNCTION THAT AFFECTED PLAINTIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE, AS A MATTER OF LAW.**

In addition to the authorities discussed in Plaintiff's brief in opposition to the instant application for leave to appeal, Plaintiff also relies on some recent authority issued by the Michigan Court of Appeals addressing "footnote 17" of the Supreme Court's decision in Kreiner v Fischer, 471 Mich 109; 683 NW2d 611 (2004). On September 27, 2005, the Michigan Court of Appeals issued a published decision analyzing footnote 17. The case is McDaniel v Hemker, \_\_\_ Mich App \_\_\_, 2005 WL 2372802, Michigan Court of Appeals Docket No. 263150 (2005).<sup>1</sup> The Court of Appeals

---

<sup>1</sup> A copy of this published slip opinion is attached herewith as Appendix 1.

noted that footnote 17 "has created much confusion and contention in the bench and bar of this state." McDaniel, supra, slip opinion p. 6.

Footnote 17 provides as follows: "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point." Kreiner, supra, at 133, n 17. The McDaniel court recognized that the placement of footnote 17 in the text of the Kreiner decision meant that it referred to one of five non-exclusive factors, factor d relating to "the extent of any residual impairment." McDaniel, supra.

Unfortunately, many lower courts, including Judge Zahra in his dissent in the case at hand, have read footnote 17 out of context and concluded that the absence of physician-imposed restrictions by itself would preclude a plaintiff from establishing that the impairment affected her general ability to lead her normal life. Judge Zahra in his dissenting opinion cited footnote 17 completely out of context for the following proposition: "Self-imposed restrictions do not establish an injury that affects one's ability to lead a normal life." Cook v Hardy, p. 1 of the dissenting opinion. That is not what footnote 17 says when read in context.

The Court of Appeals has now clarified in a published decision that footnote 17, when read in context, means as follows: "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment]." McDaniel, supra, at p. 6 [bracketed material added by the McDaniel court]. Therefore, footnote 17 is not nearly as broad as Judge Zahra and many other lower court judges believe. The McDaniel court recognized the narrow application of footnote 17 as follows:

Next, it is important to take notice of the fact that footnote 17 is not a general proposition enunciated by our Supreme Court, but rather it is tied directly to one factor, factor d, and the Court emphasized that the enumerated factors are "not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves." Kreiner, supra, at 133-134. Accordingly, simply because there may be self-imposed restrictions based on pain does not mean that a plaintiff has not established a threshold injury. A trial court must look to all of the evidence presented, consider, if relevant, all of the Kreiner factors, and view "the totality of the circumstances" in determining whether an impairment has affected "the person's general ability to lead his or her normal life" as required by MCL 500.3135(7). Kreiner, supra, at 132-134.

McDaniel, supra, at p. 8.

Moreover, footnote 17, when read in context, has a couple necessary corollaries. Specifically, the McDaniel court recognized that the language of footnote 17 when read in context necessarily means that "physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment." Id. at p. 6. Indeed, even self-imposed restrictions can establish a residual impairment under certain circumstances:

We note that a self-imposed restriction **not** based on real or perceived pain can be considered. If a plaintiff restricts himself or herself from doing something because they are physically incapable of doing so, but not on the basis of pain, the restriction should be subject to consideration in determining the extent of any residual impairment. For example, if a right-handed plaintiff's right arm is in a full cast, and said plaintiff, on his or her own, claims to be restricted from playing sports that involve throwing a ball, the self-imposed restriction would suffice.

McDaniel, supra, at p. 7. [Emphasis in the original].

It is important to note that the Kreiner court clearly did not intend to set forth a new proposition of law in footnote 17. McDaniel, supra, at p. 8. Indeed, the fact that the Supreme Court devoted just one sentence in a footnote, without citation to any legal authority in support of its statement, strongly suggests that the Court did **not** intend to

change or even clarify the law on this point. Moreover, self-imposed restrictions were not even an issue in either of the consolidated cases in Kreiner, so footnote 17 is merely *obiter dicta*. Finally, it is clear that the distinction between self-imposed restrictions and physician-imposed restrictions is contained nowhere within the text of the no-fault statute, so the Kreiner majority clearly did not intend to re-write the statute under the guise of interpretation. But see, Kreiner, supra, at 157 (Cavanagh, J., dissenting).

To the extent the text of the no-fault statute addresses this issue at all, it does so in the context of requiring an objectively manifested impairment, which element by its very nature would require physician verification based on objective medical criteria. MCLA 500.3135(7). Imposing additional medical criteria on the third-element of the serious impairment test (i.e., an impairment "that affects the person's general ability to lead his or her normal life") would be directly inconsistent with the clear text of the no-fault act. To the extent this issue is relevant at all, it would go to the weight of the evidence and the credibility of the plaintiff's testimony and other evidence concerning the affect of the impairment on the plaintiff's general ability to lead his or her normal life. These weight and credibility issues are directly dealt with within the text of the no-fault statute, MCLA 500.3135(2)(a), which provides that the serious impairment issue is a question of law for the trial court to decide only where there is no factual dispute concerning the nature and extent of the person's injury, or where there is a factual dispute concerning the nature and extent of the person's injuries but that dispute is not material. As such, the Legislature has already determined that the trial court must assume as true, at least for purposes of resolving a motion for summary disposition, the sworn testimony of the Plaintiff in support of her contention that the impairment affects

her general ability to lead her normal life. The fact that residual impairment is based on self-imposed restrictions merely creates a "factual dispute concerning the nature and extent of the person's injuries" and therefore must be left for the jury to resolve. MCLA 500.3135(2)(a).

Therefore, the Court of Appeals has interpreted footnote 17 as being largely irrelevant to the inquiry required under the no-fault act. In Behnke v Auto Owners Insurance Co, Michigan Court of Appeals Docket No. 248107, 2004 WL 2072075 (September 16, 2004), Unpublished.<sup>2</sup> The Court of Appeals interpreted footnote 17 as follows:

In a footnote, the Supreme Court indicated that "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point," that is, the extent of residual impairment. Indeed, Auto Owners argues that Behnke has no physician-imposed restrictions and is able to work full time. In our view, however, this point is not dispositive. First, although Behnke's doctors did not forbid him to return to his welding job, they did advise him against it. Second, if the salient question under the statute is whether Behnke's injury affected his ability to lead his normal life, it makes little difference whether a doctor had forbidden him to return to welding or whether he was simply unable to do so because of debilitating headaches. In sum, while we are cognizant of the requirement that the underlying **injury** be objectively manifested, the statute does not indicate that the **consequences** of the injury must be objectively manifested.

Behnke, slip opinion at p. 11. [Emphasis in the original].

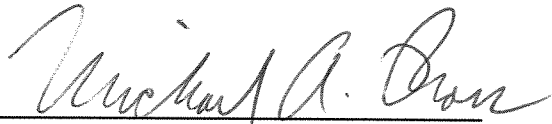
---

<sup>2</sup> A copy of this unpublished Court of Appeals opinion is attached herewith as Appendix 2.

For all these reasons, and the reasons stated in Plaintiff-Appellee's brief in opposition to Defendant-Appellant's application for leave to appeal, the Michigan Supreme Court should either deny leave to appeal or affirm the judgment of the Court of Appeals.

OGNE, ALBERTS & STUART, P.C.

By:

A handwritten signature in cursive script, appearing to read "Michael A. Ross", is written over a horizontal line.

DENNIS D. ALBERTS (P26348)

MICHAEL A. ROSS (P45266)

Attorneys for Plaintiff-Appellee

1869 East Maple Road

Troy, MI 48083

(248) 362-3707

Dated: November 3, 2005

**PROOF OF SERVICE**

On November 3, 2005, I served a copy of Plaintiff-Appellee's Supplemental Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal and this Proof of Service upon the following person(s) by mailing to each of them copies of such documents, with postage fully prepaid thereon, by ordinary mail:

THOMAS C. LEFLER, ESQ.  
Attorney for Defendant-Appellant  
40900 Woodward Avenue, Suite 200  
Bloomfield Hills, MI 48304-2255

MARY T. NEMETH, ESQ.  
Co-Counsel for Defendant-Appellant  
615 Griswold, Suite 1305  
Detroit, MI 48226



---

Robin Fenn